THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes III, Master-In-Equity

Civil Action No. 2021-CP-07-1507
Appellate Case No. 2022-000681

RECEIVED

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S.C. SUPREME COURT

Beaufort County, Appellant,

v.

Adams Outdoor Advertising Limited Partnership and Bo Hodges, Respondents.

APPELLANT BEAUFORT COUNTY'S CORRECTED REPLY SUPPORTING PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioners' ("Adams's") Return to Appellant's Petition for Writ of Certiorari ("Return") relies on hyperbole, mischaracterizes the facts, and obfuscates the sole question presented here: is Adams entitled to have its convictions thrown out for lack of written notice when Adams had *actual notice* that removing its dilapidated billboard structures and replacing them (with new structural supports in new locations) violated the zoning ordinance?

The answer is "no." Under *James v. State*, 372 S.C. 287, 293, 641 S.E.2d 899, 902 (2007), even when criminal statutes require written notice, "the law only requires actual notice."

The question presented, and its answer, are simple. So Adams mischaracterizes the question as whether *James* "require[s] all courts in South Carolina to ignore or refuse to apply mandatory statutory language relating to notice requirements under all criminal statutes and ordinances?"

Wrong. The narrower question here goes only to whether it is sufficient for a defendant to have *actual notice* that serves "[t]he purpose of" a criminal law's written notice requirement: "to assure that a defendant and his counsel have actual notice" of the conduct charged or its potential punishment. 327 S.C. at 294, 641 S.E.2d at 903. *James* says that actual notice is sufficient.

The Magistrate Court, which heard the evidence, got it right. It found that Adams had actual notice that Beaufort County's Community Development Code ("CDC") prohibited Adams from rebuilding its billboards or doing any structural repair without County approval. (R. p. 282.) This actual notice included the County's explicit directive before the work began and its oral order to stop once Adams began the work on a weekend. (*Id.*) Because "Defendants received actual notice of the violation and had actual knowledge of the location of the violation," the County's "failure to adhere to the formal notice requirements were harmless errors on its part." (*Id.*)

Adams refutes none of the reasons for granting review. Far from distinguishing *James*,

Adams highlights facts showing that the rule from *James* controls. And Adams cites *no case* vacating a conviction for lack of written notice when the defendant had actual notice. Instead, Adams and the lower appellate courts cite cases that do not address the actual notice rule here.

Adams spends much ink (Return at 10-15) repeating its claim that the County failed to follow the written notice requirements of the CDC. But this ink is wasted because the question presented assumes that premise. Indeed, actual notice in criminal cases matters *only when* the government fails to follow a statutory written notice requirement. So repeating that written notice requirements were not followed does not answer the question of whether, when that is the case, defendants who had *actual notice* of their unlawful conduct—and told the County to essentially pound sand when they were caught in the act—are entitled to have their convictions thrown out.

Under *James*, the convictions should stand because the Magistrate Court found (and the lower appellate courts did not dispute) that Adams had the requisite actual notice. The decision below to ignore the actual notice rule is worthy of this Court's review, both because it departs from this Court's clear pronouncement of a rule of law, and because it excuses—and therefore encourages—blatant violations of substantive law.

REPLY TO ADAMS'S STATEMENT OF FACTS

The County responds to Adams's incomplete and inaccurate statement of facts.

Adams says that its billboards are "controlled" by the Highway Advertising Control Act ("HACA"), but the truth is that its billboards are governed by the HACA *and* by local codes like Beaufort County's CDC. S.C. Code Ann. § 57-25-220 (express non-preemption provision).

Under the CDC, new billboards are prohibited. Moreover, "[e]xtension, enlargement, **replacement, rebuilding,** adding lights to an un-illuminated sign, changing the height of the sign above ground, **or re-erection of the sign are prohibited**." (R. p. 279 (§ 5.6.50(E)(3)) (emphasis added).) Preexisting billboards may be painted, but they may *not* be repaired or

maintained in a way "as to improve the structural integrity of the billboard" itself. (*Id*. § 5.6.50(E)(2).) Even when any repair is allowed, it is unlawful to commence without "[r]eceiving written notice" from the County "authorizing the repair work." (R. p. 280, § 5.6.50(E)(4).)

When a party violates a land use regulation, the CDC provides flexible enforcement provisions "intended to encourage the voluntary correction of violations, ***where possible***." (R. p. 507 (§ 9.1.10) (emphasis added).) But it is clear that "[a]ny failure to comply with" a CDC "standard, requirement, prohibition, or limitation . . . shall constitute a violation." (*Id*., § 9.2.20(A).) It is a clear violation to "[i]nstall, create, erect, alter, or maintain any sign without first obtaining the appropriate permits or development approvals." (R. p. 208 (§ 9.2.30(J)).)

Under CDC § 9.5.10, "[a]ny person violating" the CDC "shall be guilty of a misdemeanor …." (R. p. 511.) A violation exists, and is prosecutable, when it occurs (R. p. 507, § 9.2.20(A)), regardless of whether the violator receives a warning notice.

Moreover, "[t]he remedies provided for violations of this Development Code, whether civil **or criminal** may be cumulative and in addition to any other remedy provided by law, **and may be exercised in any order**." (R. p. 512, § 9.5.40 (emphasis added).)

On Saturday, April 10, 2021, Interim County Administrator Greenway caught Adams in the act of rebuilding billboards by removing rotted wooden structural poles and replacing them with new structural poles and re-erecting them in new spots in front of their old locations. (R. p. 194:16-195:3; *id*. p. 487; *id*. pp. 470-72 (pictures of wood poles rotted by groundwater).)

Contrary to Adams's claim, Greenway did *not* make "determinations of fifty percent sign damage" based on a "drive by." The rule about fifty percent damage from a storm is irrelevant; Adams was replacing rotted wood structural poles. Greenway saw sign structures being rebuilt in violation of CDC § 5.6.50(E)(2), (3), and knew that the County had not authorized the work.

Adams's on-site contractor rebuffed Greenway's efforts to have the work stop, and the next morning (Sunday), Adams's general counsel did the same. (R. p. 485-486.)

So Adams repeatedly rejected the County's ongoing, futile efforts to obtain voluntary compliance. On Monday, the County issued the stop work order and citations. Again contrary to Adams's claim (Return at 10), Hodges conceded that the order and citations were delivered to Adams, testifying that "probably someone in my office" signed for him. (R. p. 238:7-239:1.)

After trial, the Magistrate Court found that the "existing poles" for Adams's decades-old billboards "were rotten and splitting." (R. p. 281.) "[W]hen these poles were replaced, they were not located in exactly the same spot as the original ones because there would have been cement footings in the ground where the original poles were located and it was impossible to put them back in the same location from which they were removed." (R. p. 282-83.)

Thus, re-erecting the billboards with new structural supports in new locations without County approval (which would have been denied if requested) was unlawful, and the parties' communications from April 6 to April 11 "clearly show that the Defendants received actual notice of the violation and had actual knowledge of the location of the violation." (R. p. 282.)

REPLY TO STANDARD OF REVIEW

Adams cites only Court of Appeals cases while claiming the County did not address the applicable standard of review. Adams is mistaken. The County's petition addresses the standard for this Court to grant a petition to review a lower court's decision under Rule 242(b), SCACR. The Petition explained (*see* Pet. at 8-12) that this Court should reverse because the Court of Appeals' opinion conflicts with this Court's decision in *James* (and others), and excuses blatant violations of law. *See* Rule 242(b)(3), SCACR (explaining that certiorari is appropriate where "the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court").

REPLY ARGUMENTS

I. Adams cannot distinguish this Court's on-point authority that actual notice satisfies statutory notice procedures.

James is controlling, and requires reinstatement of the Magistrate Court's verdict. Adams's discussion of *James* only shows how the decision to throw out the verdict conflict with *James*.

In *James,* the defendant was sentenced to life in prison without parole (LWOP) even though the State did not serve him a copy of its notice of intent to seek LWOP. 372 S.C. 287, 641 S.E.2d 899 (2007). The Court of Appeals reversed because the statute was "clear and unambiguous in its requirement that both a defendant and his counsel be served with written notice of the State's intention to seek an LWOP sentence prior to trial." *Id.* at 290, 641 S.E.2d at 900.

This Court reversed the Court of Appeals. Since "[t]he purpose" of the written notice requirement is to "assure that a defendant and his counsel have actual notice" that the State is seeking an LWOP sentence at least ten days prior to trial, "so long as the defendant and his counsel, at least ten days prior to trial, possess actual notice of the State's intention" to seek such a sentence, "the statute has been satisfied." *Id.* at 294-295, 641 S.E.2d at 903.

Thus, in the criminal context—even when the matter at hand is as weighty as an LWOP sentence—a technical procedural defect (such as a lack of formal written notice like that alleged here) will not invalidate a sentence where the defendant had actual notice.

Adams cannot distinguish *James*. Indeed, each of Adams's five bullet points (Return at 8-9) actually proves that *James* requires the verdict to stand. The County responds to each below:

- During preliminary motions, "both Respondents and Respondent's counsel indicated that each was aware that Respondent was facing the possibility of an LWOP sentence[]" (*id.* at 291, 641 S.E.2d at 901).
    - **County response**: In other words, both respondent and respondent's counsel had *actual notice* of the substance of what the written notice would convey. Likewise, both Adams and Hodges had "actual notice of the violation and had actual knowledge of the location of the violation." (R. p. 282.)

- At the same hearing, "Respondent's counsel stipulated that the defense had received adequate notice[]" (*id.*)

    - **County response**: This is not a distinguishing fact. The issue in *James* was whether respondent's counsel was ineffective for making this stipulation even though the State had not followed the statute's written notice requirement. This Court held that respondent's counsel was *not* ineffective because "under such notice statutes, the law only requires actual notice." *Id.* at 293, 641 S.E.2d at 902.

- During the sentencing hearing, "the solicitor provided the court with a copy of the written notice he had previously given to Respondent's counsel[]" (*id.*)

    - **County response**: This fact is irrelevant because the State violated the statute's clear requirement to provide written notice to the *defendant* himself.

- Respondent could not "demonstrate that that [sic] but for trial counsel's errors, there [was] a reasonable probability the result of the trial would have been different[,]" a necessary element of ineffective assistance of counsel (*id.* at 292, 641 S.E.2d at 902);

    - **County response**: This is a "harmless error" standard. Here, the Magistrate Court found that Adams had actual notice, so the lack of written notice under the CDC was harmless and would not have changed the verdict. (R. p. 282.) But the Circuit Court and Court of Appeals erred by failing to show, in light of Adams's actual notice, that the trial result would have been different if Adams had received written notice in addition to actual notice. The result could not have been different, since all written notice does is ensure that the defendant has actual notice, which Adams had.

and

- "Respondent indicated on several occasions, including months in advance of trial," that he knew he was facing an LWOP sentence under the statute (*id.* at 295 no.5, 641 S.E.2d at 903 n.5).

    - **County response**: Similarly, Adams and Hodges were told on several occasions between April 6 and April 11 (from zoning staff emails, Mr. Greenway's in-person instruction, his follow-up emails, etc.) that rebuilding the billboards or doing any repairs to them without County authorization violated the CDC. (R. p. 194:13-20; R. p. 486-487.)

Further, nothing supports Adams's claim that the rule of law stated in *James*—"that under such notice statutes, the law only requires actual notice," 372 S.C. at 293, 641 S.E.2d at 902—applies only to the one statute in that case. The rule is based on "[t]he purpose of" the written notice requirement, 327 S.C. at 294, 641 S.E.2d at 903, which is always to ensure that the

defendant has *actual notice* of the offense charged or the punishment sought. *Id*. Once that purpose is accomplished through actual notice, the lack of written notice is inconsequential because "the statute has been satisfied." *Id.* at 294-295, 641 S.E.2d at 903.

That is the case here. Adams had actual notice of the violation and the location where Adams committed it, so the statute has been satisfied. *Id*.; (R. p. 282). Adams has never once suggested that it was prejudiced, in any way, in putting on its defense because it didn't receive a written warning or an address on the citation.

At bottom, Adams's suggestion—that actual notice is sufficient when the government seeks life in prison without parole, but *in*sufficient when it seeks a $1,000 fine—is untenable.

Adams's argument about harmless error fares no better. The harmless error doctrine avoids "reversals on purely formal and technical grounds" while assuring "that substantial justice has been done." *West v. Newberry Elec. Co-op*, 357 S.C. 537, 544, 593 S.E.2d 500, 504 (Ct. App. 2004) (quoting 5 Am. Jr. 2d *Appellate Review* § 711 (1995)).

The court below violated this doctrine. It reversed "on purely formal and technical grounds" that did not undermine Adams's guilt in any way, and thus *impeded* justice from being done.

Adams cannot rely on *Arizona v. Fulminante*, 499 U.S. 279 (1991), to argue that *only* "errors at trial during the case's presentation to the jury" (Return at 14) may be considered harmless. *Fulminante*'s emphasis on "trial error" was to differentiate incidental errors during trial from "structural defects in the trial mechanism," such as "total deprivation of counsel at trial," which is not subject to harmless error analysis. 499 U.S. at 309.

In fact, *Fulminante* supports the County's position because it explains that "harmless-error doctrine is essential to preserve the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for

the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Id*. at 308.

Adams's argument also runs headlong into *James*, because the error there—the State's failure to provide the defendant himself with statutorily-required written notice that it would seek LWOP—was not made during the case's presentation to the jury, but well before trial commenced. Yet because the defendant had *actual notice* of the State's intent to seek that sentence, and because "the law only requires actual notice," the "statute has been satisfied." *James*, 372 S.C. at 293-295, 641 S.E.2d at 902-03.

Here, the undisputed facts adduced at trial in the Magistrate Court prove Adams's guilt. But the Circuit Court's order declaring Adams "not guilty," and the Court of Appeals' affirmance of that decision, undermines public respect for the criminal process where, as here, there is no dispute that Adams had actual notice and the trial by which Adams was found guilty was fair.

II. There is no authority to support the lower court's holding.

Adams tries in vain to bolster the decision to throw out Adams's convictions with citations to inapposite authority. In none of the cited cases did a court vacate the conviction of a defendant who had actual notice based on the government's failure to follow written notice procedures.

1. *State v. Boston*, 433 S.C. 177, 857 S.E.2d 27 (Ct. App. 2021).

Adams asserts that the lower court "correctly applied the principle in *Boston* that "[S]tate courts can develop state law to provide their citizens with a second layer of constitutional rights." (Resp. at 15.) Adams then claims that the CDC "may afford additional *constitutional* rights for notice and service of process." (*Id.*)

This is nonsense. Only the South Carolina Constitution—or this Court's authoritative construction of it—can provide South Carolina citizens a second layer of *constitutional* rights.

A local ordinance does not establish constitutional rights or requirements.

To be sure, the Beaufort County CDC's notice procedures are designed to comport with due process by giving a violator *actual notice* that their conduct violates the CDC. Since it is undisputed that Adams and Hodges received actual notice that rebuilding their billboards violated the CDC, "the statute has been satisfied" along with the due process principle that animates the statute. *James*, 372 S.C. at 295, 641 S.E.2d at 903.

2. *State v. Leopard*, 349 S.C. 467, 563 S.E.2d 342 (Ct. App. 2002).

Adams's reliance on *State v. Leopard* is also misplaced.

That case does not involve a court vacating a conviction for failure to strictly comply with notice procedures when the defendant had actual notice. Rather, it stands for the undisputed (and irrelevant) proposition that courts construe statutes according to their literal meaning. *Leopard*, 349 S.C. at 470-471, 563 S.E.2d at 344. But that does not contradict the principle that a valid conviction should not be vacated for failure to follow written notice procedures when the defendant had actual notice. Even assuming that the County failed to follow the written notice requirements as written in the CDC, *James* holds that Adams's convictions should not be thrown out because Adams had actual notice that their conduct violated the law. *James*, 372 S.C. at 293, 641 S.E.2d at 902.

Nor does *Leopard* support Adams's ipse dixit that the "County must face the highest level of scrutiny" because it drafted the CDC. (Resp. at 17.) The issue is not the *scrutiny* applied to interpreting the CDC, but rather the impact of actual notice.

3. *Criterion Ins. Co. v. Hoffman*, 258 S.C. 282, 188 S.E.2d 459 (1972).

Criterion Insurance, a civil case, is irrelevant here. It is nonsense for Adams to claim that the County's right to enforce its ordinances is a pure statutory right that is forfeited if it does not send a redundant notice of violation to a violator who has actual notice of his violation.

Adams ignores that CDC § 9.5.10 states that "any person violating this Development Code shall be guilty of a misdemeanor." That guilt turns on the existence of the violation, not on receipt of a written notice about it.

The County's right to enforce its land use and police power ordinances is fundamentally different than a purely statutory right of an insured to recover money from his insurer for damages inflicted by an uninsured motorist. *Cf. Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 692 S.E.2d 499 (2010) (holding that local governments, unlike private parties, are generally not subject to estoppel where it would prevent the exercise of its police power or thwart the application of public policy). *Criterion Insurance* is inapplicable.

4. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011).

Finally, Adams's attempt to shore up the decision below by citing *Town of Mt. Pleasant* is misplaced. That case did not involve written notice requirements or the actual notice rule.

In *Town of Mt. Pleasant*, this Court affirmed dismissal of a conviction for driving under the influence because the arresting officer's vehicle was not equipped with a video camera as required under state law. 393 S.C. at 348, 713 S.E.2d at 286. Notably, "the statute provided that the failure to produce videotapes would be a ground for dismissal if no exceptions apply." *Mt. Pleasant*, 393 S.C. 332, 345, 713 S.E.2d 278, 285 (2011) (cleaned up). No exceptions applied. In dismissing the case, this Court noted that "[t]he term 'dismissal' is significant as it explicitly designates a sanction for an agency's failure to adhere to" the camera requirement. *Id*.

But *Town of Mt. Pleasant* is not a case about a notice requirement, but instead is about a substantive proof of guilt requirement. Adams's substantive proof of guilt was found by the Magistrate Court and left undisturbed on appeal. And despite Adams's unsupported statements to the contrary, the CDC sections its cites do not designate *any* sanction for failure to send a written

warning notice of violation, much less the extreme sanction of dismissal. *Mt. Pleasant* is therefore inapposite.

At bottom, Adams's argument for dismissal is circular. It argues that non-compliance with written notice requirements justifies dismissal because the failure is no small defect, and then claims that the failure is no small defect because it requires dismissal.

But *James* holds that if the defendant has actual notice, then the purpose of the written notice requirement has been satisfied, and the failure to provide written notice does *not* justify dismissal. Dismissing in this kind of case, where actual notice was had and guilt is clearly established, impedes justice.

III. The County followed this Court's rules.

Adams's allegations that the County violated this Court's rules are spurious.

First, Adams asserts that it did not receive proper service of the petition under Order No. 2024-04-24-01, Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024) ("Order"). Adams is mistaken.

The Order states, "a lawyer admitted to practice law in South Carolina may serve a document on another lawyer admitted to practice law in South Carolina using the lawyer's primary e-mail address listed in the Attorney Information System (AIS)." (Order ¶ (d)(1).)

Here, Brittany Ward (S.C. Bar #103966) signed the petition. She could have served it by having her legal assistant email it to opposing counsel, as South Carolina lawyers do through their assistants every day. Instead, she had her co-counsel, a lawyer admitted pro hac vice, email it. Adams's attorneys timely received the petition, asked the Court for an extension of time, and then filed their Return. Adams's complaint about service is without merit.

Next, Adams asserts that the County failed to comply with Rule 404(c), SCACR. But only after the petition was filed was it assigned a docket number, and the Court has not yet granted the

petition. In any event, the County has provided the Court a copy of the order granting pro hac vice, along with the name and South Carolina Bar Number of the associated regular member of the South Carolina Bar. This argument is likewise without merit.

IV. Conclusion

Adams's finger-pointing is just another attempt to divert attention from the substantive issue. Adams, after receiving actual notice from the County, blatantly rebuilt and re-erected antiquated billboards with new structural supports in new locations. Even when the County Administrator caught Adams in the act, Adams refused to stop the illegal reconstruction.

The Magistrate Court found that Adams had actual notice of both the violation and the location of the violation, that the failure to follow the CDC's (obviously futile) written notice requirements was harmless, and that Adams was properly found guilty. That is the result that the actual notice rule in *James* requires. Thus, the Magistrate Court's verdict should be reinstated.

Respectfully submitted,

s/ Brittany Ward
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